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Cases Cited.

Statute Cited.

SUPREME COURT OF THE UNITED STATES.

No. 625.

JAMES C. ROGERS,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

Respondent submits that the questions presented for review are as follows:

(1) The evidence showed that petitioner slipped on loose ballast on top of a drainage culvert on respondent's right of way, while attempting to walk across the culvert backwards, rapidly, and with his arm over his eyes. Was such

evidence sufficient to raise a jury question as to whether petitioner was provided a reasonably safe place to work, when there was no evidence that the top of the culvert was not entirely safe for normal and foreseeable use, and when there was no evidence that respondent had any knowledge, actual or constructive, as to the existence of the loose gravel?

(2) The evidence showed that respondent, in order to remove weeds from its right of way, adopted a method of spraying the weeds to kill them, and then having its section men burn the weeds, using a torch with a three foot handle which enabled the section men to remain six feet away from the fire. Was this evidence sufficient to raise a jury question as to an unsafe method of work, when there was no evidence that there was any other method safer or better under the circumstances?

(3) Petitioner now virtually admits that the ruling of the Missouri Supreme Court that the evidence was insufficient to raise a jury question as to an unsafe place of work, or as to an unsafe method of work. May petitioner now be heard to complain of such ruling for reasons and grounds not pleaded or submitted to the jury?

STATEMENT OF THE CASE.

The petitioner, James C. Rogers, brought this action under the Federal Employers' Liability Act (45 U. S. C. 51) to recover damages for injuries alleged to have been sustained by him on July 17, 1951, when, during the course of his employment, he was burning weeds on respondent's right of way near Garner, Arkansas, and, as he claims, fell on one of respondent's drainage culverts.

Petitioner alleged negligence of the respondent in providing an unsafe and dangerous place of work and in

adopting an unsafe and dangerous method of work (R. 2). Respondent denied all of the allegations of negligence (R. 3) and alleged petitioner's injuries, if any, were directly caused or contributed to by his own negligence (R. 4).

The evidence showed that respondent's right of way runs generally north and south (R. 7), at the place in question. Garner crossing, a public crossing, is the southerly most point involved. It crosses the right of way from east to west. The right of way consists of a "dump," on which gravel ballast is placed, then ties on the gravel and rails on the ties (R. 24). There are two sets of tracks, the one on the east for northbound trains and the one on the west for southbound trains (R. 7). The dump is wider than the area occupied by the tracks, ties and ballast, and extends from three feet to three and one-half feet out from the ballast (R. 8). The area from the ballast to the crest of the dump is called the shoulder. Petitioner claims to have been injured on the west side of the dump about two hundred fifty to three hundred yards north of Garner crossing at a drainage culvert (R. 38) on which he says he slipped and fell (R. 7). It was contended by petitioner that the shoulder of the dump was maintained and kept free from gravel for use as a path or walkway for section men to walk upon, but that this particular culvert was covered with gravel so that there was no flat level surface upon which petitioner could walk.

Respondent's evidence contradicted petitioner's contention that the shoulder was maintained for section men as a walkway or path, and further contradicted the contention that the top of the culvert was provided or maintained as a walkway (R. 51, 53, 58, 70, 73, 74, 87).

Petitioner, at the time of his injury, was "firing" or burning weeds on the west side of the right of way (R. 8,

11). In order to do so, he was given a torch made of a quart container with a spout on one side and a three-foot handle on the other (R. 9). The spout was stuffed with rags for a wick and the container filled with kerosene. The weeds had previously been sprayed with a weed killer and had withered and died. It was petitioner's duty to hold the lighted torch to the dead weeds, thereby burning them off.

The petitioner was twenty-seven years old at the time of trial, married with one child and living at McRae, Arkansas. He had lived all of his life in McRae, except for nine months in 1947 when he lived at Benton Harbor, Michigan. He was employed with the Missouri Pacific Railroad Company on May 21, 1951 (R. 35). On July 17, 1951, he, together with the other members of the section crew, reported for work at the customary time of 7:00 A. M. at McRae (R. 8). Petitioner testified that between McRae and Garner crossing they stopped to put in a few ties and arrived at Garner crossing about 10:30 A. M. (R. 8). They traveled on a motor car. When they got to Garner crossing, petitioner was given the hand torch by Mr. Howdershell, his foreman, and was told to burn the weeds on the right of way (R. 10). The rest of the crew went three hundred to four hundred yards north of the crossing to replace ties (R. 16). Petitioner was to burn weeds on the west side of the right of way to a path about two hundred yards north of the culvert (some four hundred to four hundred fifty yards north of the crossing) and then cross over to the east side of the right of way and burn the weeds back to the crossing (R. 11).

Petitioner testified that he had never done that work before, nor had he seen anyone attempt to fire weeds with a device such as the torch he was given. He said that normally a machine was used which spouted flame onto the right of way (R. 9). On cross-examination, he tes-

tified that the use of the flame throwing machine was something that took place long before he went to work on the railroad and that it was never used to his knowledge while he was there. He did not know anything about the operation of the flame throwing machine, nor of the duties of the section crew while it was in operation (R. 26, 27). His only knowledge of it was that, before he went to work for the railroad, he had stood and watched it pass along.

Petitioner said nothing to Mr. Howdershell when he was given the hand torch with which to burn the weeds. He did not inquire about using the flame throwing machine, nor did he tell Mr. Howdershell that he did not know how to burn the weeds with the torch which was given him (R. 17)

Petitioner burned weeds on the right of way north from Garner crossing for about thirty to forty-five minutes before he was injured (R. 10). He was getting along all right and had no trouble in his work (R. 17, 18). He was burning "just spots." He said that he had a flat dirt surface to walk on as he proceeded north (R. 9). He described it as a path about three feet wide between the ballast and the edge of the dump (R. 18). He testified that the foreman required the men to keep the shoulder free from gravel so that the men would have a place to walk (R. 33). As he walked north, he walked about two and one-half feet from the west edge of the ties (R. 9). He did not have to burn weeds to his right, but only to his left and he did not burn weeds all of the way down the dump, but only in spots for a distance of about two and one-half or three feet to his left (R. 19).

When he reached a point about thirty or thirty-five feet south of the culvert, he heard a train whistle for Garner crossing (R. 11). Normally, he said, the foreman would call coming trains in advance, but he had no notice of the

one approaching on this day (R. 15). On cross-examination, however, he admitted that he heard the train in plenty of time and that it caused him no surprise and that he had plenty of time after hearing it (R. 20). When he heard the train he "quit firing" and ran thirty to thirty-five yards north of his fire and stood about six or eight feet south of the culvert to watch the train for hot boxes (R. 13, 14). He said that the foreman had instructed the men that when a train went by the men were to stop what they were doing and watch the train for hot boxes (R. 12). On cross-examination, however, he testified that he had never been told to ignore a fire which he had set in order to watch a train for hot boxes, and that he had never thought the foreman meant that he was to do so, nor did he put any such construction on the foreman's previous orders that he was to do so (R. 29). He knew that it was his primary duty to watch and tend the fire (R. 30).

Petitioner knew that a wind follows a passing train, and he got ahead of his fire (R. 28). Because the train was on the far track from him (about fifteen or twenty feet) he did not think the wind would affect the fire too much (R. 29). At the time, he thought he was far enough away to clear himself from the fire or any danger from the fire (R. 14, 29). When petitioner got to a place six or eight feet south of the culvert, the engine of the train was just passing him (R. 14). He knew he was close to the culvert, he could see it, he knew it was there, and knew he was standing right next to it (R. 20, 21). He had worked near the culvert before (R. 39). It was no mystery to him, although he had not previously paid particular attention to it.

Petitioner describes his accident as follows (R. 14):

> "At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or

any danger of the fire and it was time to start to watch these journals. So I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell."

He walked backwards about three or four steps with his hand or arm over his face. He did not look to see where he was walking (R. 23, 24). Petitioner testified that culverts are numerous on railroads and that he has seen many of them. He said on direct and redirect examination that normally they have a flat surface upon which one can walk (R. 14, 32). On cross-examination, however (R. 25), he said that there was no path or flat surface across culverts such as is on the shoulder.*

This particular culvert, petitioner testified, was covered with gravel. The gravel caused an incline on the top of the

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* (R. 25) Q. You say the section gang keeps a path there for themselves to walk on? A. It is there, yes, sir.

Q. On both sides of the right of way? A. Yes, that's right.

Q. Every place on the railroad you have been? A. No, sir, not every place.

Q. Well, all along the right of way on that section you worked on? A. Yes; there is a flat surface of dirt other than where the culverts are.

Q. Other than where the culverts are? A. Yes.

Q. So any time you come to a culvert there isn't any. Is that right? A. There is not a dirt, flat surface.

Q. At any culvert? A. To a certain extent; I mean not like a shoulder is.

Q. That condition prevails throughout your entire section. A. Yes, sir.

and where each imparts character to the others'' (323 U. S. 600, 604).

As to the culvert, which was but one element of the danger created by respondent's negligence, petitioner does not now and has never contended as respondent suggests, that respondent is obliged to construct drainage culverts up and down its line so that men could walk across them backwards, blindly and rapidly, without slipping and falling (Respondent's brief, page 15). Petitioner does maintain, however, that when respondent subjected the petitioner to the unusual hazards of fire by requiring him to stand in close and dangerous proximity to an oncoming train, which would and did cause the fire to spread rapidly, that then respondent owed the petitioner the non-delegable and continuing duty to provide a reasonably safe place in which to perform the tasks assigned to him. Otherwise respondent had no right to compel petitioner to stand on the west shoulder while performing the duty of watching the train for ''hot boxes.'' And when it did so, the method and place of work became thereby unsafe and dangerous.

The Duties Petitioner Was Required to Perform and the Circumstances Under Which He Was Required to Work Made Injury to Him Almost a Certainty. At Least, Such an Eventuality Was Clearly Foreseeable.

Certainly there is no merit in respondent's claim that petitioner's injury was unforeseeable. The only reason respondent did not foresee or anticipate the likelihood of petitioner's injury is that it failed to give any consideration to petitioner's safety. Had the respondent given any thought to the matter,

1) It would not have required the petitioner to stand upon the west shoulder and to watch for ''hot boxes'' in close and dangerous proximity to the tracks upon which a train was then and there being operated in

such manner as to cause the flames to fan toward and upon the petitioner.

2) It would have provided him with adequate footing to contend with the dangers to which he was thus exposed.

Under the evidence, it is difficult to imagine how anyone could have escaped from injury and no crystal ball was needed to foresee the likelihood of such injury. "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Restatement of Torts, sec. 435 (1).

Restatement of Petitioner's Contentions.

Petitioner contends that the condition of the culvert under the circumstances increased petitioner's peril and contributed to his injury. In any event, respondent's failure to provide an adequate means of escape from the fire was only one of the elements of danger created by respondent. Even if the jury found that the culvert and walkway were literally perfect, and that petitioner would have been injured regardless thereof, it was still warranted in finding that respondent was negligent in creating the peril which caused petitioner to move and act as he did.

In discussing the method of work respondent simply attempts to justify the use of the hand torch instead of the flame-throwing machine. As we have pointed out before, petitioner is not contending that the use of the hand torch alone endangered his safety. Petitioner simply contends that the jury had a right to consider respondent's conduct as a whole—including every element of the danger—in determining whether or not respondent was negligent under the circumstances.

Petitioner has spelled out in detail the reasons why the method and place of work, in the light of the entire factual situation surrounding petitioner's injury, were unsafe and dangerous. The fact that respondent ignores them only makes them stand in bold relief.

This is not a case where the employee voluntarily selected his own place of work, as in Frizzell v. Wabash R. Co. (8 Cir., 1952), 199 F. 2d 153, cited by respondent. Nor was petitioner given the opportunity of calm and collected judgment. He was acting in an emergency attempting to escape from the ravages of fire and flames blown upon him by respondent's train. Likewise, these facts are radically different from those in Wolfe v. Henwood (8 Cir., 1947), 162 F. 2d 998, and Gill v. Pennsylvania R. Co. (3 Cir., 1953), 201 F. 2d 718, cited by respondent. In the Wolfe case, supra, the employee voluntarily without any order from his employer undertook to burn waste material while his clothing was saturated with inflammables. In the Gill case, supra, there was no emergency whatsoever and Gill was not required to move suddenly and quickly to avoid any hazard.

CONCLUSION.

For the reasons given in petitioner's brief and in this reply brief, petitioner again respectfully submits that the judgment of the Supreme Court of Missouri should be reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1955

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GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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